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OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, PETITIONERS

v.

GRAY PANTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether regulations of the Secretary of Health and Human Services governing the extent to which certain states that participate in the Medicaid program may consider the income of an applicant's spouse in determining eligibility for and the amount of Medicaid assistance are arbitrary, capricious, or otherwise unlawful.

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The Solicitor General, on behalf of the Secretary of Health and Human Services and the Administrator of the Health Care Financing Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is not yet reported. The opinion of the district court (App. E, *infra*, 23a-30a) is reported at 461 F. Supp. 319.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 21a-22a) was entered on July 29, 1980. On October 20, 1980, the Chief Justice extended the time in which to petition for a writ of certiorari to and including November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 1902(a)(17) and (f) of the Medicaid Act, 42 U.S.C. 1396a(a)(17) and (f), the regulations invalidated by the court of appeals (42 C.F.R. 435.734, 436.602, 436.711, and 436.821), and 42 C.F.R. 435.723 are reprinted, in pertinent part, in App. H, *infra*, 35a-38a.

STATEMENT

1. The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 1-2. As adopted in 1965, Title XIX required participating states to provide medical assistance to individuals who received cash assistance under any of

the four "categorically needy" assistance programs established in the Social Security Act.[1] Under Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), each participating state was required to adopt "reasonable standards * * * for determining eligibility for and the extent of medical assistance," taking into account "only such income and resources as are * * *available to the applicant or recipient." Furthermore, in response to practices that had been adopted by states in administering the medical assistance plans established under the predecessor Kerr-Mills program, Congress required participating states to refrain from taking into account "the financial responsibility of any individual for any applicant or recipient of assistance * * * *unless such applicant or recipient is such individual's spouse*" or minor, blind, or disabled child. 42 U.S.C. 1396a(a)(17)(D) (emphasis added).

With the approval of the Secretary of Health, Education, and Welfare (now Health and Human Services), some participating states took the position that it was reasonable to expect an applicant's spouse to help pay the cost of the applicant's medical expenses and, therefore, adopted rules that took into account the income of the spouse in determining Medicaid eligibility and the amount of assistance. These states calculated an amount considered necessary to pay the basic living expense of the applicant's spouse and "deemed" any income of the spouse in excess of that amount as "available" to the applicant. In accordance with Congress' expressed intent that the medical expenses of the "most needy" be met first under the Medicaid pro-

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[1] Old Age Assistance (OAA), Title I, 42 U.S.C. (1970 ed.) 301 *et seq.*; Aid to Families with Dependent Children (AFDC), Title IV, 42 U.S.C. (1970 ed.) 601 *et seq.*; Aid to the Blind (AB), Title X, 42 U.S.C. (1970 ed.) 1201 *et seq.*; Aid to the Permanently and Totally Disabled (APTD), Title XIV, 42 U.S.C. (1970 ed.) 1351 *et seq.* Participating states could also offer medical assistance to the "medically needy"— *i.e.*, individuals whose income was greater than permissible under the categorical assistance plans but inadequate to pay medical expenses. Congress, however, thought it appropriate that the medical expenses of the "most needy" be met before extending benefits to the less needy. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77 (1965).

gram,[2] the amount considered necessary to pay the basic living expenses of the applicant's spouse was generally set near subsistence level.

In 1972, Congress replaced three of the four categorical assistance programs with a new federal program, Supplemental Security Income for the Aged, Blind, and Disabled (SSI), Title XVI, 42 U.S.C. 1381 *et seq.*[3] From the beginning of the Medicaid program in 1965, participating states were required to provide medical assistance to those individuals receiving benefits under their categorical assistance programs. Adoption of the SSI program was not intended to affect this traditional linkage. But under the SSI program, the states would no longer control the standards of need for the aged, blind, or disabled. The group of individuals who would be eligible for SSI assistance, and therefore eligible for Medicaid assistance, was in some states significantly larger than the group that was eligible under the prior assistance programs for the aged, blind, and disabled. To avoid forcing the states that participated in the Medicaid program to choose among (1) expanding their Medicaid assistance obligations involuntarily, (2) withdrawing from the Medicaid program, and (3) reducing the level of benefits provided under the Medicaid program, Congress offered the states what has come to be called the "209(b) option," 42 U.S.C. 1396a(f).[4] Each state was given the choice of providing medical assistance to all recipients of cash assistance under the SSI program or to the more limited group of individuals who would have been eligible for assistance under the state's Medicaid plan on January 1, 1972.

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[2] See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77, 78–79 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess. 66, 68 (1965).

[3] As its name indicates, the SSI program replaced the categorical assistance plans for the aged, blind, and disabled. The provisions of the old categorical assistance programs remain in effect in Puerto Rico, Guam, and the Virgin Islands. See Pub. L. No. 92–603, Title III, Section 303(a) and (b), 86 Stat. 1484.

[4] The provision was enacted as Section 209(b) of the Social Security Amendments of 1972, Pub. L. No. 92–603, 86 Stat. 1381.

Under the SSI statute, the income of an applicant's spouse is attributed to the applicant for the purpose of determining eligibility and the amount of assistance.[5] Any state that participates in the Medicaid program but fails to exercise the 209(b) option (an "SSI state") is required to provide medical assistance to all SSI benefit recipients. Because of the relationship between the Medicaid and SSI statutes, and to avoid the unfairness and administrative difficulties involved in permitting individual SSI states to determine Medicaid eligibility by reference to rules different from those applied in determining SSI eligibility, the Secretary issued regulations requiring SSI states to consider the income of an applicant's spouse in making Medicaid determinations only to the extent required by the SSI statute. 42 C.F.R. 435.723.[6]

In addition, the Secretary required 209(b) states to consider the income of an applicant's spouse in determining Medicaid eligibility and the level of benefits at least to the extent that it would be considered in a SSI state. 42 C.F.R. 435.734. Section 209(b) of the 1972 amendments, 42 U.S.C. 1396a(), however, authorizes the states that

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[5] When the applicant and his spouse live in the same household, the income of both is considered in deter ining the eligibility of either for SSI benefits. 42 U.S.C. 1382(a)(2), 1382c(b), (f)(1). When the applicant and his spouse cease to share the same household, the income of the applicant's spouse is no longer considered in determining the applicant's eligibility for SSI benefits, unless the applicant's spouse is an "eligible spouse," as defined in 42 U.S.C. 1382c(b). By definition, no one can remain an "eligible spouse" for more than six months after separation from his spouse. 42 U.S.C. 1382c(b).

[6] For example, without such regulations, if an applicant became eligible for and received SSI benefits because his noneligible spouse no longer lived in his home and therefore her income was not attributed to him, he would be eligible for Medicaid benefits in an SSI state. But if the same individual were unwilling to accept SSI benefits and applied directly to the state Medicaid agency for benefits under a program for the "medically needy" with higher income standards, he might nevertheless be denied medical assistance if the state Medicaid rules continued to take into account the income of his spouse. This discrimination between needy individuals and equally needy individuals who, for their own reasons, are unwilling to accept SSI benefits clearly was not intended by Congress. See 40 Fed. Reg. 60074 (1975).

exercise the 209(b) option to apply the more restrictive eligibility standards of their Medicaid programs that were in effect in January 1972. Therefore, the Secretary concluded that it would be appropriate to allow Section 209(b) states to consider the income of an applicant's spouse to the extent they would have done so under their 1972 Medicaid plans. 42 C.F.R. 435.734.

2. Respondent filed suit in the United States District Court for the District of Columbia, challenging the Secretary's regulations governing the extent to which the income of an applicant's spouse could be considered in making Medicaid determinations in 209(b) states, Puerto Rico, Guam, and the Virgin Islands.[7] Respondent argued that these regulations were inconsistent with Section 1902(a)(17) of the Social Security Act, 42 U.S.C. 1396a(a)(17), and the Due Process Clause of the Fifth Amendment (App. E, *infra*, 26a–27a). Finding the statutory contention dispositive, the district court did not reach respondent's constitutional claims (*id.* at 27a n.3). According to the district court (*id.* at 28a & n.5), Section 1902(a)(17)(D) of the Act, 42 U.S.C. 1396a(a)(17)(D), "may allow a state to enforce its financial responsibility laws against a spouse or parent," but a participating state may not consider any portion of the income of an applicant's spouse to be "available" to the applicant without making an individual determination of the living expenses of the spouse. The court thus held that the challenged regulations were invalid and ordered the Secretary to adopt new regulations "requir[ing] all [209(b) jurisdictions, Puerto Rico, Guam, and the Virgin Islands] to cease the deeming of income for any length of time between institutionalized Medicaid recipients or applicants and their noninstitutionalized spouses * * *" (App. F, *infra*, 31a–32a; App. G, *infra*, 33a–34a).[8]

[7] 42 C.F.R. 435.734, 436.602, 436.711, 436.821 (App. H, *infra*, 36a–38a); see App. E, *infra*, 23a n.2; App. G, *infra*, 33a. Respondent is "a voluntary organization dedicated to improving the treatment accorded our nation's elderly" (App. A, *infra*, 2a). The district court found that respondent had standing to challenge the regulations because some of its members would have standing (App. E, *infra*, 27a n.4).

[8] Given its interpretation of Section 1902(a)(17) of the Act, the district court's invalidation of 42 C.F.R. 435.734 is understandable. The

A divided panel of the court of appeals affirmed, but on grounds other than those relied on by the district court. The court of appeals rejected (App. A, *infra*, 8a) the Secretary's analysis of the pertinent statutory provisions, asserting that "there is no required federal statutory 'deeming' in the 209(b) jurisdictions which are the subject of this case." The court of appeals acknowledged (*id.* at 9a) that the "legislative history of the Medicaid statute explicitly addresses the question of when 'deeming' is proper" and "establishes a broad principle * * * that 'deeming' is appropriate between spouses * * *," but it found (*id.* at 10a) that the legislative history of the statute also "recognizes exceptions to the general rule, requiring individualized factual determinations of availability to be made." Citing this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), the court of appeals held the regulations invalid because the Secretary, in authorizing deeming in 209(b) states, failed to consider all of the factors and policy concerns the court thought "relevant" (App. A, *infra*, 7a). It therefore remanded the case to the district court (*id.* at 13a) "with direction to remand it to the Secretary for promulgation

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basis for the court's invalidation of the regulations applicable in Puerto Rico, Guam, and the Virgin Islands is more difficult to discern. First, 42 C.F.R. 436.602, which is essentially a restatement of Section 1902(a)(17)(D), simply prohibits the consideration of the income of any of the applicant's relatives, except his spouse or (in some circumstances) his parent. Second, 42 C.F.R. 436.711 and 436.821 simply require the relevant Medicaid agencies to apply the financial eligibility requirements that would be applied in determining eligibility under the old categorical assistance plans (see note 1, *supra*), including the extent to which the income of a spouse should be considered. Since Puerto Rico, Guam, and the Virgin Islands are required to provide medical assistance to all categorical assistance recipients (see 42 U.S.C. 1396a(a)(10)(A)) and (except with respect to the "medically needy" and AFDC beneficiaries) are not entitled to federal assistance for providing medical assistance to individuals who are ineligible to receive benefits under the categorical assistance programs, it is difficult to understand how any other rules could be applied. See also note 6, *supra*. The court of appeals also failed to distinguish between the regulations applicable in 209(b) jurisdictions and those applicable in Puerto Rico, Guam, and the Virgin Islands.

without delay of new regulations consistent with the Medicaid statute as interpreted in this opinion."

Judge MacKinnon concurred in part and dissented in part (App. A, *infra*, 13a–17a). Judge MacKinnon agreed that the Medicaid Act permits participating states to attribute the income of one spouse to another. In his view, however, "there is nothing to suggest that the Secretary's action in promulgating the regulations allowing the use of 'deeming' in 209(b) States is arbitrary or capricious, [which is] the limit of our scope of review* * *" (*id.* at 17a; App. C, *infra*, 20a).

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision in this case is one of four recent circuit court decisions concerning deeming practices under the Medicaid Act. See *Herweg* v. *Ray*, 619 F.2d 1265 (8th Cir. 1980), petition for cert. pending, No. 80–60 (filed July 14, 1980); *Brown* v. *Stanton*, 617 F.2d 1224 (7th Cir. 1980), petition for cert. pending, No. 79–1690 (filed Apr. 25, 1980); *Norman* v. *St. Clair*, 610 F.2d 1228 (5th Cir. 1980), petition for cert. pending *sub nom. Harris* v. *Norman*, No. 80–498 (filed Sept. 27, 1980).[9] Each of these decisions is to some extent irreconcilable with the others.

Although the court of appeals decision in this case is the first to invalidate the HHS regulations applicable in 209(b) jurisdictions for failure to consider all "relevant" factors, in reaching this result the D.C. Circuit rejected the Secretary's analysis of the relationship between the Medicaid statute and the SSI statute as a sufficient basis for the regulations (App. A, *infra*, 7a–8a). According to the court of appeals (*id.* at 8a):

[9] See also *Allen* v. *Califano*, Civ. No. 78–0212 (D. Utah Aug. 23, 1979), appeal pending, No. 79–2167 (10th Cir.) (ordering the Secretary to rescind 42 C.F.R. 435.734 and to issue regulations that require 209(b) states, Guam, Puerto Rico, and the Virgin Islands "to cease assuming the availability of any income that is not in fact available for any length of time" (Order at 2)). The proceedings in *Allen* have been stayed pending consideration of the Secretary's petition for a writ of certiorari in this case.

> It is enough to say that there is no required federal statutory "deeming" in the 209(b) jurisdictions which are the subject of this case, and that there is no justification for extending the antifraud six-month limitation on the general policy beyond its statutory confines.

By contrast, in *Norman* v. *St. Clair*, *supra*, the Fifth Circuit expressly relied on the relationship between the Medicaid and SSI statutes in rejecting the contention that deeming is improper in 209(b) states. The Fifth Circuit explained:

> [U]nder certain circumstances Medicaid eligibility determinations in an "SSI state" must, because of the statutory mandate in the SSI legislation, take into account income that is deemed available, without regard to whether that income is actually contributed. Since this statutory mandate exists concurrently in the Medicaid law with the provision of 42 U.S.C. § 1396a (a)(17) directing that only income which is "available" be taken into account, it must be concluded that the income deemed to Medicaid applicants pursuant to provisions of law applicable to SSI states is available income. A concept of available income which includes income deemed to spouses in SSI states must also encompass income deemed to spouses in the more restrictive programs of the § 209(b) states.

610 F.2d at 1238. Whether or not the Fifth Circuit's reading of the SSI and Medicaid statutes is the only permissible interpretation, it is certainly a reasonable interpretation and one with which the Secretary agrees in substantial part. Yet, the D.C. Circuit has ordered the Secretary to promulgate regulations consistent with its opinion, which effectively precludes reliance on the relationship between the two statutes.

Other related aspects of deeming practices under the Medicaid program have also been the subject of substantial disagreement among the courts of appeals. In *Brown* v. *Stanton*, *supra*, for example, the Seventh Circuit held that Indiana, a 209(b) state, could not consider the income of an applicant's spouse in determining Medicaid eligibility or fixing the level of benefits, if the spouse is unwilling to

contribute to the applicant's medical expenses. Instead, Indiana must ignore the income of the applicant's spouse, advance the full amount of the medical expenses, and then attempt to recoup the overpayment from the reluctant spouse. 617 F.2d at 1230–1231. In *Norman* v. *St. Clair*, *supra*, however, the Fifth Circuit expressly rejected the reasoning adopted by the Seventh Circuit:

> We must reject plaintiffs' contention that 42 U.S.C. § 1396a(a)(17)(D) merely authorizes the states to invoke formal financial responsibility proceedings for the support of spouses. We hold instead that 42 U.S.C. § 1396a(a)(17)(D) permits states to deem income from one spouse available to the other and that such deemed income is part of the "available" income which states may compute under 42 U.S.C. § 1396a (a)(17)(B).

610 F.2d at 1237. But the Fifth Circuit went on to hold that, contrary to the Secretary's regulation (42 C.F.R. 435.734), Mississippi, a 209(b) state, must adopt a "flexible means" test for the purpose of determining what part of the income of an applicant's spouse is "available" to the applicant.[10]

Finally, in *Herweg* v. *Ray*, *supra*, the Eighth Circuit (by an equally divided court) affirmed a district court decision holding that under Section 1902(a)(17) of the Social Security Act, 42 U.S.C. 1396a(a)(17), Iowa, an SSI state, may consider the income of an applicant's spouse without regard to the length of time that the applicant has been separated from his spouse. Since the Secretary was not a party to the proceeding, the district court declined to pass on the validity of the HHS regulations applicable in SSI states. Nevertheless, the district court pointed out that to the extent the regulations limited the time period during which SSI states may consider the income of an applicant's spouse, they are inconsistent with the Medicaid statute. *Herweg* v. *Ray*, 443 F. Supp. 1315, 1320 (S.D. Iowa 1978), aff'd by an equally divided court, 619 F.2d 1265 (8th Cir.

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[10] In *Harris* v. *Norman*, No. 80–498, the Secretary of Health and Human Services seeks review of this aspect of the Fifth Circuit's decision.

1980), petition for cert. pending, No. 80-60 (filed July 14, 1980); see also *Herweg* v. *Ray*, *supra*, 619 F.2d at 1272-1275.

These conflicting decisions are all based, at least in part, upon interpretations of Section 1902(a)(17) of the Social Security Act, 42 U.S.C. 1396a(a)(17). That section is one of the fundamental provisions governing Medicaid eligibility. Consequently, the divergent interpretations of the courts of appeals have posed serious problems for the Secretary in supervising the administration of state Medicaid programs. Because the Court will have the opportunity to resolve the conflict in the circuits concerning the validity of "deeming" under the Medicaid Act this Term (see *Brown* v. *Stanton*, *supra*), it should consider the closely related issue raised in this case as well. If the Court holds that the statute allows deeming, it is important that the form that deeming may take be settled as expeditiously as possible.

These issues have a direct and immediate impact upon the federal and state governments as well as millions of individuals. Every state in the nation, except Arizona, has implemented a medical assistance program under Title XIX of the Social Security Act. United States Department of Health, Education, and Welfare, *Data on the Medicaid Program: Eligibility, Services, Expenditures* 40 & n.3 (1979 ed.). In fiscal year 1977, more than 23 million individuals received federal and state Medicaid payments totalling more than $16 billion (*id.* at 40, 57). The 16 states that have already decided to exercise the Section 209(b) option provided Medicaid benefits to nearly eight million individuals in fiscal year 1977 (*id.* at 57; App. A, *infra*, 4a n.4).[11] The impact of "deeming" practices, however, is not limited to the millions of individuals who currently are eli-

[11] The 209(b) regulations at issue in this case are of significance not only to the states that have already exercised the option provided by Congress in 42 U.S.C. 1396a(f), but also to every other participating state. For example, New York, one of the largest of the participating states, recently decided to exercise the 209(b) option. (New York is now awaiting HHS approval of amendments to its Medicaid plan that would effect the conversion.) Other SSI states are free to follow.

gible for Medicaid notwithstanding the income of their spouses. It is obvious that both the number of individuals who would be eligible for Medicaid assistance and the amount of assistance that would be paid to such individuals will be significantly enlarged if the income of their spouses must be ignored.

It is the Secretary's responsibility to require participating states to provide medical assistance to each qualified applicant with a minimum of administrative delay and cost and to assure that participating states do not receive federal financial assistance for providing medical assistance to any applicant who is not among the intended beneficiaries of the Medicaid program. Because of the conflicting decisions of the courts of appeals, the Secretary now must follow different rules in different states concerning whether "deeming" is permissible at all and, if it is, in what manner and for how long it may be used.

2. Although the court of appeals correctly concluded that the language and legislative history of the Medicaid statute establish the "broad principle" that deeming is appropriate between spouses (App. A, *infra*, 9a), it found that Congress intended an exception to "the seemingly unequivocal expectation that spouses should support each other" (*id.* at 10a) in cases where the spouses are not living together. In reaching this conclusion, the court below noted that Congress expressed the view that Section 1902(a)(17) was designed to prevent the states from assuming the availability of income from absent fathers in reliance on "support orders."[12] According to the court of appeals (App. A, *infra*, 10a), Congress intended to preclude consideration of the absent father's income because "[t]he absence of the father from the home undercuts key assumptions that make 'deeming' ordinarily reasonable, and thus the practice is forbidden." Despite the absence of any reference in the legislative history to absent *spouses*, the court remarked: "Likewise, the absence of a spouse from the home because of institutionalization differs significantly * * * from the situation of cohabiting spouses

[12] See H.R. Rep. No. 213, 89th Cong., 1st Sess. 67 (1965); S. Rep. No. 404, 89th Cong., 1st Sess. 78 (1965).

which is at the heart of the congressional expectation of support" (*ibid.*). As a result, the court held that the Secretary's deeming regulations are invalid for failure expressly to consider these differences.

The court of appeals erred in striking down the Secretary's regulations as inconsistent with the Medicaid Act. As the court acknowledged, the term "available" income in 42 U.S.C. 1396a(a)(17) includes the income of the applicant's spouse "deemed" available to the applicant. Under the SSI statute, the income of an applicant and his spouse is considered in determining eligibility for as long as they live together. See 42 U.S.C. 1382(a)(2), 1382c(b), (f)(1). In determining SSI eligibility, "deeming" may also continue for six months after the applicant and his spouse begin living apart from each other. See 42 U.S.C. 1382(a)(1), 1382c(b), (f)(1). Under the Medicaid statute, each participating state is required to provide medical assistance to all SSI recipients, unless the state exercises the 209(b) option. 42 U.S.C. 1396a(a)(10)(A), (f). It follows, therefore, that SSI states cannot consider the income of an SSI recipient's spouse in making Medicaid determinations if the income would not be considered in making SSI eligibility determinations. Furthermore, because, with exceptions not material here (see note 6, *supra*), participating states are not entitled to federal financial assistance for providing Medicaid benefits to individuals who are ineligible for SSI benefits, it also follows that such states must consider the income of an applicant's spouse in making Medicaid determinations if it would be considered in making SSI determinations.

The Secretary acted reasonably in requiring 209(b) states to follow SSI deeming rules in determining Medicaid eligibility and the amount of assistance. If, in SSI states, the term "available" income, as used in 42 U.S.C. 1396a(a)(17), includes the income of an applicant's spouse to the extent required by the SSI statute, then logically the term should be given the same interpretation in 209(b) states. See *Norman* v. *St. Clair*, *supra*, 610 F.2d at 1238. Moreover, unless 209(b) states are required to consider the income of an applicant's spouse at least to

the extent that it would be considered in an SSI state or under the SSI statute, the congressional intent underlying the 209(b) option would be wholly frustrated. The 209(b) option was intended solely to permit participating states to *exclude* from coverage individuals who would be eligible under the SSI criteria, and therefore eligible for Medicaid coverage (see 42 U.S.C. 1396a(a)(10)(A)), but who would not have been eligible under the more restrictive standards of the states' 1972 Medicaid plans. See S. Rep. No. 92-1230, 92d Cong., 2d Sess. 222 (1972); S. Rep. No. 95-553, 93d Cong., 1st Sess. 56 (1973). Hence, the purpose of the 209(b) option was to avoid imposing *expanded* Medicaid obligations on participating states as a result of the more liberal SSI eligibility requirements. The option was not intended to permit 209(b) states to receive federal aid for providing medical assistance to individuals who would not be eligible even under the more liberal SSI criteria. See, *e.g.*, S. Rep. No. 92-1230, *supra*, at 222.

In addition, the Secretary's regulations permitting 209(b) states to take the income of an applicant's spouse into account to the extent that they would have done so under their 1972 Medicaid plans are also consistent with the statute. Section 1902(a)(17) permits participating states to consider the income of an applicant's spouse as "available" to the applicant for the purposes of determining eligibility and the amount of assistance under the Medicaid program. If the eligibility criteria of a 209(b) state's 1972 Medicaid plan are valid, the Secretary has no power under the statute to require the state "to provide medical assistance to any aged, blind, or disabled individual * * * unless such State would be (or would have been) required to provide medical assistance to such individual * * * had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect * * *." 42 U.S.C. 1396a(f).[13] Having approved each of the state Medicaid plans in effect on January 1, 1972, the Secretary was not obliged to reconsider all of the varying circumstances in which state

[13]The 209(b) "spend-down" provision qualifies this statement to some extent but is not pertinent here.

deeming practices would be applied before promulgating the 209(b) regulations challenged in this case. The regulations merely permit 209(b) states to consider the income of an applicant's spouse to the extent that they would have done so under their 1972 Medicaid plans—as Congress intended by enacting the 209(b) option.

The regulations applicable in 209(b) jurisdictions thus are based on the Secretary's sound analysis of the pertinent statutory provisions and due regard for the practical and equitable administration of a nationwide social welfare program. See *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977). But even if the regulations were not *required* by the relationship between the Medicaid program and the various categorical assistance programs, the court of appeals erred in invalidating the regulations. The Secretary is specifically authorized to establish standards for determining what is "available" income for purposes of the Medicaid program. 42 U.S.C. 1396a(a)(17). The SSI statute provides an appropriate model because the eligibility criteria for Medicaid have consistently been tied to eligibility under the categorical assistance programs. Similarly, even if the language of 42 U.S.C. 1396a(f) did not *require* the Secretary to permit the 209(b) states to use the deeming rules in effect in 1972, the provision provides ample support for the Secretary's decision to do so. As this Court pointed out in a similar context, "[a] reviewing court is not free to set aside [such] regulations simply because it would have interpreted the statute in a different manner." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). The Secretary's regulations are entitled to legislative effect, unless it can be said that they are arbitrary, capricious, or otherwise unlawful. *Id.* at 425–426.

Contrary to the court of appeals' conclusion, nothing in the legislative history of the Medicaid statute supports a general absent-spouse exception to the "broad principle" that deeming is appropriate between spouses. The court below relied on the following statement in the House Report accompanying the bill that became Title XIX of the Social Security Act (App. A, *infra*, 10a):

> [Section 1396a(a)(17) is] designed so that the States will not assume the availability of income which may

> not, in fact, be available or over-evaluate income and resources which are available. Examples of income assumed include support orders from [*sic*] absent fathers, which have not been paid or contributions from relatives which are not in reality received by the needy individual.

H.R. Rep. No. 213, 89th Cong., 1st Sess. 67 (1965).[13] The court's reliance on this passage was misplaced.[14]

This case involves only the deeming of income between spouses—more precisely, the deeming of income between an institutionalized applicant and his spouse. The language of the statute, 42 U.S.C. 1396a(a)(17)(D), permits consideration of the income of an applicant's spouse. Moreover, the legislative history of the statute clearly indicates that Congress thought it appropriate to require the husband or wife of a Medicaid applicant to help pay the medical expenses of the applicant. See H.R. Rep. No. 213, *supra*, at 68; S. Rep. No. 404, *supra*, at 78. Nowhere in the voluminous legislative hearings, reports or debates is there any suggestion of an absent-spouse exception.[15] In these circumstances, the isolated statement in the House Report disapproving the policy of assuming that an applicant has income on the basis of a "support order" directed to his

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[13] See also S. Rep. No. 404, *supra*, at 78.

[14] Whether or not this snippet of legislative history would have required the Secretary to prohibit consideration of the income of an absent father is not a question raised in this case. In any event, HHS regulations only require 209(b) states to consider the income of an applicant's parent if the applicant is (1) living with his parent and (2) under age 18 or a student and under age 21. See 42 C.F.R. 435.734, 435.724. In accordance with 42 U.S.C. 1396a(f), however, if under a state's 1972 Medicaid plan the income of a parent would have been considered under additional circumstances, the state may continue to do so.

[15] The reference in the House Report to "contributions from relatives which are not in reality received by the needy individual" cannot be read to support a general absent-spouse exception. Congress expressly addressed that problem in 42 U.S.C. 1396a(a)(17)(D), prohibiting consideration of any relative's financial responsibility for the applicant, *except* the applicant's spouse or, in some circumstances, the applicant's parent.

absent father is insufficient to support the conclusion that the Secretary's regulations regarding *spouses* are inconsistent with the Medicaid Act.[16] Rather, "this is a case in which the meaning of [the] statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction." *United States* v. *Clarke*, No. 78-1693 (Mar. 18, 1980), slip op. 1.

To be sure, the court of appeals' reading of the legislative history of the statute is not implausible. But that is not a sufficient basis for finding that the Secretary's current regulations are arbitrary, capricious, or otherwise unlawful. As the court of appeals observed (App. A, *infra*, 12a), "Congress has stated that it is the primary responsibility of the Secretary, and not the courts, to determine whether and to what extent 'deeming' is to be permitted from an individual to his or her institutionalized spouse." It should be emphasized that the regulations permitting 209(b) states to consider the income of an applicant's spouse to the extent that they would have done so under their 1972 Medicaid plans were adopted in light of a statutory provision, 42 U.S.C. 1396a(f), that was specifically intended to avoid state withdrawals from the Medicaid program. Without substantially greater support than that relied on by the court of appeals in this case, a court should be particularly reluctant to invalidate such regulations. See *Batterton* v. *Francis*, *supra*, 432 U.S. at 431-432.[17]

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[16] The court of appeals' reliance on the reference in the House Report to "support orders" directed to "absent" fathers is particularly inappropriate in this case. Unlike the situation of a father who abandons his child and who must be directed by a court to provide financial support for the child, this case involves spouses who are separated solely because of the necessary institutionalization of one of them. Under these circumstances, the separation does not even suggest abandonment or the break down of the marital relationship.

[17] *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, provides no support for the court of appeals' position. In *Overton Park*, this Court held that where it was asserted that an agency failed to consider factors *expressly* required by the relevant statutes, review of agency

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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action cannot be based on "'*post hoc*' rationalizations" presented in litigation affidavits. 401 U.S. at 419–421. Here, however, respondent has never contended that the Secretary failed to consider any factor expressly prescribed in the Medicaid statute and, indeed, never relied on *Overton Park* in the courts below. Neither the language of the Medicaid statute nor its legislative history suggests that the Secretary's regulations prescribing what can be considered "available" income are arbitrary or capricious. *Overton Park* cannot be read to permit courts to invalidate regulations solely on the ground that factors or policy concerns the particular court thinks relevant were not expressly considered by the agency.

APPENDIX A

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1334

GRAY PANTHERS

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 78-0661)

Argued January 15, 1980

Decided July 29, 1980

Before WRIGHT, *Chief Judge*, MACKINNON, *Circuit Judge*, and MARKEY,* *Chief Judge, United States Court of Customs and Patent Appeals.*

Opinion for the court filed by *Chief Judge* WRIGHT.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* MACKINNON.

WRIGHT, *Chief Judge:* This appeal is from a successful challenge to regulations of the Department of Health and Human Services[1] which implement the Medicaid program

* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

[1] This action was filed before the redesignation of the Department of Health, Education, and Welfare as the Department of Health and Human Services. *See* 20 U.S.C.A. § 3508 (Supp. 1980).

and which involve the financial eligibility criteria for institutionalized individuals and their spouses. Plaintiff-appellee is Gray Panthers, a voluntary organization dedicated to improving the treatment accorded our nation's elderly. The regulations in question permit, among other things, a certain amount of a spouse's funds to be "deemed" available for use by the institutionalized individual, whether or not such funds are in fact provided. Because "deeming" applies "an arbitrary formula, unrelated to the expenses of a particular couple's needs," the District Court held the practice to be forbidden by a statutory requirement that only income available in fact be taken into account for Medicaid eligibility purposes. It therefore vacated the regulations and remanded them to the Secretary for reconsideration. *See Gray Panthers v. Secretary, Dep't of Health, Educ. & Welfare*, 461 F. Supp. 319, 323 (D. D.C. 1978). We agree with the result reached by the District Court but not for its assigned reasons. We believe the Secretary has failed to consider all the relevant factors in determining whether "deeming" is proper in this context. We therefore affirm the judgment of the District Court which vacated the regulations as invalid, but order the case remanded to the Secretary for reconsideration consistent with this opinion.

I

Medicaid is a cooperative federal-state program established pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (1976). Regulations promulgated in accordance with the Act supplement the statutes in providing a framework within which the states must operate their Medicaid programs. A state is not required to establish a Medicaid program, but should it do so the program must conform to federal requirements. 42 U.S.C. § 1396a. A "State plan" must be submitted to and approved by the Secretary. 42 U.S.C. § 1396a(b). The state then becomes entitled to federal funds which partially reimburse expenditures made to provide specific types of medical assistance. Section 1902 of the Social Security Act, 42

U.S.C. § 1396a, provides the statutory guideline to which state medicaid eligibility criteria must conform:

> (a) Contents
>
> A State plan for medical assistance must—
>
> * * * * *
>
> (17) include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient * * *, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child * * *[.]

In addition to providing this general framework for Medicaid eligibility criteria, the statute places limits on the specific provisions that the states may adopt. States may choose to be governed by one of two rules in this regard. First, 42 U.S.C. § 1396a(a) provides that Medicaid assistance must be made available to all individuals who qualify for cash benefits under the Supplemental Security Income (SSI) program, Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.* (1976). In these "SSI states" Medicaid eligibility is determined by statute in accordance with uniform federal standards.

States electing to be governed by the second rule, however, are not required to conform to the explicit SSI criteria. Pursuant to the "209(b) option,"[2] 42 U.S.C. § 1396a(f), any state may choose to establish more stringent eligibility criteria, so long as the criteria are no more restrictive than those in the state's "categorical assist-

[2] The option is so named because it was added by § 209(b) of the 1972 amendments to the Social Security Act, Pub. L. No. 92-603, 86 STAT. 1484.

ance"[3] program that was validly in effect on January 1, 1972. Such programs were the precursors to the SSI program. They were enacted and administered by states in cooperation with the federal government, and their eligibility criteria varied from state to state. This case challenged only the HHS regulations permitting "deeming" in the 209(b) jurisdictions[4] whose eligibility criteria are not explicitly prescribed by federal statute.

A bit of history is necessary to understand the purpose behind the 209(b) option. Before the option was enacted, creating the SSI and 209(b) classifications, all jurisdictions were treated alike for purposes of establishing Medicaid eligibility criteria. Each state was required to provide Medicaid assistance to any individual who qualified for its categorical assistance program. When Congress brought most of these programs under federal administration through enactment of SSI, this principle of automatic eligibility was retained. But the federal SSI eligibility criteria allowed for broader coverage than that provided by many of the state plans. As a result, states would have been forced to expand their Medicaid programs involuntarily, and in some cases significantly. "[I]n order not to impose a substantial fiscal burden on these States," S. Rep. No. 93-553, 93d Cong., 1st Sess. 56 (1973), and to avoid the threat that some states would withdraw from

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[3] The categorical assistance programs were established by various subchapters of the Social Security Act then in effect: Old-Age Assistance, Title I, 42 U.S.C. § 301 *et seq.*; Aid to Families with Dependent Children, Title IV, 42 U.S.C. § 601 *et seq;* Aid to the Blind, Title X, 42 U.S.C. § 1201 *et seq;* and Aid to the Permanently and Totally Disabled, Title XIV, 42 U.S.C. § 1351 *et seq.* Titles I, X, and XIV were subsequently repealed (except in Guam, Puerto Rico, and the Virgin Islands) by the 1972 amendments to the Social Security Act that established SSI, Pub. L. No. 92-603, § 303(a) & (b), 86 STAT. 1484 (effective Jan. 1, 1974). *See* discussion *infra.*

[4] Fifteen states have exercised the 209(b) option: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Utah, and Virginia. In addition, the same regulations apply to the island jurisdiction of Guam, Puerto Rico, and the Virgin Islands, to which the SSI program never applies. *See* note 2 *supra.*

the Medicaid program entirely rather than fund the expanded coverage, *see West v. Cole*, 390 F.Supp. 91, 98 (N.D. Miss. 1975), Congress enacted the 209(b) option. Electing states could thus prevent extension of Medicaid coverage to any persons not then entitled to benefits.[5]

"Deeming" is a procedure used in determining an applicant's financial eligibility for Medicaid. A certain amount of the non-institutionalized individual's funds is conclusively presumed—is "deemed"—to be available for contribution toward the cost of his or her spouse's institutionalization. In SSI jurisdictions "deeming" is specifically required by statute. The statute provides that the income and resources of two cohabiting spouses are to be pooled for purposes of determining the financial eligibility of either. 42 U.S.C. § 1382(a)(2). In other words, income earned by one spouse is conclusively presumed to be earned jointly by the couple, and all such jointly earned income in excess of the statutorily prescribed maintenance level for the couple is considered to be available to either spouse. Where both spouses are otherwise eligible for Medicaid,[6] and one spouse is institutionalized, the pooling of funds continues for six months. The effect of this scheme is thus to "deem" a portion of the non-institutionalized individual's income and resources to be available for support of his or her spouse. After six months of institutionalization only the income and resources of the institutionalized spouse are considered for determining eligibility, and the "deeming" ceases. 42 U.S.C. § 1382c(b). Where only one of the spouses is otherwise Medicaid-eligible, pooling of income must cease with the first month after institutionalization. 42 U.S.C. § 1382c(f).

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[5] This statement is qualified by the fact that 209(b) jurisdictions *were required to enact "spend down"* provisions, whose effect would be to extend Medicaid coverage to some persons not eligible on January 1, 1972. A "spend down" provision deducts funds spent toward medical care from those otherwise considered available for purposes of determining Medicaid eligibility.

[6] That is, aged, blind, or disabled so as to qualify the applicant for relief under the SSI program. *See* 42 U.S.C. § 1381a.

By contrast, "deeming" in the 209(b) jurisdictions at issue in this case proceeds in a more direct manner, although actual practices vary considerably. Typically, the state specifies a "maintenance" level of income and resources for the noninstitutionalized spouse. Any funds in excess of this figure are conclusively presumed to be available for contribution toward the costs of institutionalization. In most states direct Medicaid payments to the institution are automatically reduced by this excess amount. Required medical care is thus usually withheld or terminated if the "deemed" amount is not in fact paid by the noninstitutionalized spouse.[7] The HHS regulations in question permit this "deeming" to occur in each state to the extent that it was the state's practice on January 1, 1972.

II

A

This court's review of the regulations in question must proceed within narrow bounds. The Medicaid statute provides that "available" income and resources shall be "as determined in accordance with standards prescribed by the Secretary[.]" 42 U.S.C. § 1396a(a)(17)(B). Where, as here, Congress has explicitly entrusted to the agency the primary task of defining statutory language, that definition is "entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

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[7] Of the 209(b) states only Minnesota appears to be an exception: "The local welfare agency shall not withhold, delay or deny Medical Assistance because a responsible relative deemed able to contribute fails or refuses to accept financial responsibility." 12 Minn. Code of Agency Rules § 2.047 (Dep't of Public Welfare 47) C.5.b.(5). In *Brown v. Stanton*, ___ F.2d ___ (7th Cir. No. 79-1459, decided Jan. 30, 1980), the Seventh Circuit imposed a similar rule on the operation of the Indiana Medicaid program as a matter of statutory interpretation of § 1396a(a)(17). Because of our disposition in this case, we have no occasion to comment on the Seventh Circuit's holding in *Brown*.

law.' 5 U.S.C. §§ 706(2)(A), (C)." *Batterton v. Francis*, 432 U.S. 416, 426 (1977). *See Herweg v. Ray*, 619 F.2d 1265 (1980) (equally divided court sitting *en banc*) (opinion of McMillian, J.). Although this is a narrow standard, it does not relieve the court of its duty to conduct a searching inquiry. Even where no specific statutory requirements are being enforced, the court "must consider whether the decision was based on a consideration of the relevant factors * * *." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *See Kollett v. Harris*, 619 F.2d 134, 140 (1980). Because we conclude that the Secretary has not taken the relevant factors into account in promulgating the regulations at issue in this case, the District Court's judgment vacating those regulations must be upheld.

B

The Secretary argues primarily that no internally consistent interpretation of the Medicaid statute can prohibit "deeming" in 209(b) jurisdictions. In SSI jurisdictions "deeming" is required by statute for six months.[8] SSI jurisdictions, like 209(b) jurisdictions, are governed by the requirement of Section 1396a(a)(17) that only "available" income be considered in determining eligibility for benefits. Because "available" income incorporates "deeming" in SSI jurisdictions, the Secretary argues, the same term cannot be defined to prohibit the practice in 209(b) jurisdictions. "A concept of 'available income' which includes income 'deemed' in SSI states for a six month period *must also* encompass income 'deemed' to institutionalized spouses in the '209(b) states.'" Brief for appellants at 14 (emphasis in original).

We do not believe the statutorily required "deeming" in SSI states should be given such dispositive weight with respect to 209(b) jurisdictions. We perceive the governing principle in SSI states to be that the institutionalized individual is to be held solely responsible for his or her own

[8] *See* p. 6 *supra*.

medical care, with "deeming" a very narrow exception.[9] *See* 42 U.S.C. § 1382(a)(1). The six-month "deeming" period appears in the statute as a limitation on the availability of cash payments under the SSI program. *See* 42 U.S.C. § 1382c(b). That limitation might well apply for Medicaid purposes in SSI jurisdictions, which have incorporated in full the SSI eligibility criteria. But it does not reflect a decision by Congress that "deeming"—for six months or for any period of time—is necessarily an appropriate practice in the 209(b) jurisdictions that are the subject of this case. More important, the legislative history shows that the six-month "deeming" provision was designed to serve the limited purpose of deterring fraud in the form of a voluntary separation of spouses in order to receive increased benefits. *See* H.R. Rep. No. 92-231, 92d Cong., 2d Sess. 150 (1971). By its own terms, for example, Section 1382c(b) does not apply where only one of the spouses is otherwise eligible[10] for Medicaid. And there is no indication that its propriety was considered in the context of separations caused by institutionalization, where fraud is presumably not a concern. In any event, the relationship between Section 1396a(a)(17) and the statutory "deeming" in SSI states is not now before the court, and we intimate no opinion with respect to it. It is enough to say that there is no required federal statutory "deeming" in the 209(b) jurisdictions which are the subject of this case, and that there is no justification for extending the antifraud six-month limitation on the general policy beyond its statutory confines.[11]

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[9] HHS itself recognizes that "only in highly limited situations does 'deeming' apply to physically separated relatives and then only when they can be said to be 'constructively' members of the same household[.]" *See* 42 FED. REG. 2685 (1977). Further, this six-month period applies *only* where the noninstitutionalized spouse is also Medicaid-eligible. This fact takes on significance in a different context. *See* discussion immediately following.

[10] *See* text at note 5 *supra*.

[11] The extension of the six-month "deeming" suggested by the government would be twofold: first in the application of the policy to

The Secretary further argues that enactment of the 209(b) option, which permitted states to continue to use their 1972 Medicaid eligibility criteria, amounted to a specific congressional approval of those criteria. Because some states used "deeming" in 1972, the Secretary concludes, the practice was sanctioned by Congress and cannot now be prohibited by this court. Although this is certainly a plausible argument, there is nothing in the legislative history of Public Law No. 92-603, 86 STAT. 1484, to support it. The purpose of the 209(b) option was only to ensure that enactment of the SSI program, with its more generous eligibility criteria, would not automatically increase a state's Medicaid burden.[12] Congress was not expressing its view that "deeming," as then practiced in state Medicaid programs, was consistent with the requirements of the Medicaid statute. We thus agree with the Fifth Circuit's declaration that the 209(b) option cannot be read as an "all-purpose 'grandfathering' clause which effectively legitimizes any and every provision appearing in a state plan in 1972." *See Norman v. St. Clair*, 610 F.2d 1228, 1235 (1980).

C

We turn now to a discussion of the factors that are relevant to the Secretary's ultimate determination of whether and to what extent "deeming" should be permitted from an individual to his or her institutionalized spouse. The legislative history of the Medicaid statute explicitly addresses the question of when "deeming" is proper. It establishes a broad principle, or expectation, that "deeming" is appropriate between spouses and from parents to children: "Your committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their [Medicaid-eligible] children * * *." H.R. Rep. No. 213, 89th Cong.,

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209(b) jurisdictions where it is not required by statute, and second in the sense that the HHS regulations permit the policy to be applied in 209(b) jurisdictions beyond the statutory six-month durational limit.

[12] *See* p. 5 *supra*.

1st Sess. 68 (1965); S. Rep. No. 404, 89th Cong., 1st Sess. 78 (1965). But with equal clarity the legislative history recognizes exceptions to the general rule, requiring individualized factual determinations of availability to be made:

> [Section 1396a(a)(17) is] designed so that the States will not assume the availability of income which may not, in fact, be available or overevaluate income and resources which are available. Examples of income assumed include support orders from [*sic*] absent fathers, which have not been paid or contributions from relatives which are not in reality received by the needy individual. * * *

H.R. Rep. No. 213, *supra*, at 67. The question for the Secretary is how the policies underlying the general rule and its exceptions are to be applied to the diverse factual situations posed in this case.

At first blush the facts here presented appear to be embraced by the seemingly unequivocal expectation that spouses should support each other. But Congress has demonstrated that a much more flexible approach must be taken. Parents of Medicaid-eligible children, for example, are under a similarly unqualified expectation of support. And yet the legislative history specifically excludes from "deeming" support from *absent* fathers. The absence of the father from the home undercuts key assumptions that make "deeming" ordinarily reasonable, and thus the practice is forbidden. Likewise, the absence of a spouse from the home because of institutionalizaton differs significantly in two respects from the situation of cohabiting spouses which is at the heart of the congressional expectation of support.

First, the general rule of mutual support proceeds from the assumption that the spouses maintain a common household, "sharing" income and expenses, *see* 42 FED. REG. 2685, 2686 (1977), and constituting a single economic unit. But where institutionalization has caused one spouse to be absent from the home, two households, not one, in effect must be maintained. Expenses can no longer fairly

be characterized as jointly incurred, and "deeming" no longer accurately reflects the economic norm. An important condition that makes "deeming" ordinarily reasonable between spouses is thus not met.

Second, and more important, the limited potential for disruption of the family was a determinative factor in permitting "deeming" between spouses and from parents to children. "Beyond such degree of relationship, however, requirements [of support] imposed are often destructive and harmful to the relationships among members of the family group." S. Rep. No. 404, *supra*, at 78; H.R. Rep. No. 213, *supra*, at 68. The legislative history of Section 1396a(a)(17) recognizes that, especially in the context of the family structure, great care must be exercised to ensure that governmental regulation does not needlessly disrupt people's lives. In contrast with the ordinary situation of cohabiting spouses, institutionalized individuals and their husbands or wives are particularly vulnerable to the disruptive forces than can be exerted by governmental regulations. In most cases the individual's continued institutionalization depends upon his or her spouse's ability (or willingness) to pay the "deemed" amount.[13] The spouse is thus faced with the "choice" of reducing his or her standard of living to a point apparently set near the poverty line, or being responsible for the eviction of his or her spouse from the institution.[14] The institutionalized individual is often literally helpless to temper the harshness of this dilemma.

These two distinctions appear whenever one spouse has been institutionalized. Their importance depends upon the circumstances of each case. It is entirely possible, for example, that the Secretary would choose to treat spouses who were living apart before the institutionalization differently from spouses who were living together. Similarly, whether support payments were being made on a regular

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[13] *See* text at note 6 *supra*.

[14] One "alternative" to payment of the "deemed" amount is divorce. We do not consider this an acceptable option to mitigate the potential disruptive effect of "deeming" in this context.

basis from one separated spouse to the other might itself prove to be a determinative factor. There are many factual differences with respect to which the propriety of "deeming" must be determined. These are problems for the Secretary to consider. Naturally, not every potential situation can be addressed by the Secretary's regulations. But the regulations must apply reasonably to the situations they do address, and must develop general principles applicable to different situations as they arise.

D

Congress has stated that it is the primary responsibility of the Secretary, and not the courts, to determine whether and to what extent "deeming" is to be permitted from an individual to his or her institutionalized spouse. Such determination, however, must proceed within the framework established by the Medicaid statute. It is our duty to ensure that this occurs. The record in this case reflects that HHS regulations permit "deeming" in 209(b) jurisdictions because the Secretary thought that internal consistency within the Medicaid statute required such permission, and that Congress has specifically approved the practice. We disagree. To the contrary, in issuing regulations implementing the 209(b) option the Secretary is required to consider those policy concerns, outlined in part above, which Congress intended would guide her discretion in determining under what circumstances, and to what extent, "deeming" would be permitted.[15]

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[15] Using an approach similar to that taken in this case, the First Circuit in *Kollett v. Harris*, 619 F.2d 134 (1980), upheld HEW regulations under which SSI cash payments to disabled children are reduced by a "deemed" amount. The court recognized as applicable the *Overton Park* requirement that the regulations be the product of a consideration of the relevant factors. This requirement was met in *Kollett* because the Secretary "gave sufficient attention to a wide range of issues including the general type of matters mentioned by the district court [to be relevant]." 619 F.2d at 141. We are confident that the "deeming" regulations challenged in this case would not pass a comparable test. Accordingly, we have no occasion to comment on the relatively forgiving interpretation of *Overton Park* employed in *Kollett*.

III

The District Court's order vacating the subject regulations is affirmed. The case is remanded to the District Court with direction to remand it to the Secretary for promulgation without delay of new regulations consistent with the Medicaid statute as interpreted in this opinion.

So ordered.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part.

In my view we should uphold the "deeming" practice involved in this appeal, and the basis of my disagreement with the majority's approach on this point is set forth below.

"Deeming" is the use of a formula to make a determination of the income available to support an institutionalized spouse, or, as defined by the district court, the "imputing of income on the basis of an arbitrary formula, without regard to the amount actually available to the institutionalized spouse . . ." *Gray Panthers* v. *Secretary, Department of Health, Education and Welfare*, 461 F. Supp. 319, 321 (D.D.C. 1978). As with any formula the approach may result in hardship in cases where it imperfectly reflects the financial condition of the married couple involved. At the same time, "deeming" is a rational and necessary method of making a determination of available support and assessing financial responsibility in a program like Medicaid which involves hundreds of thousands of people, millions of dollars, *Herweg* v. *Ray*, ___ F.2d ___, No. 78-1664 (8th Cir. March 18, 1980); *Norman* v. *St. Clair*, 610 F.2d 1228, 1242-3 (5th Cir. 1980), and allocates limited resources. *Dandridge* v. *Williams*, 397 U.S. 471, 478-79 (1969). *See also Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

My disagreement with the majority opinion centers upon its failure to accord unequivocal approval to "deeming" as prescribed in the regulations of the agency. While the majority opinion approves the "deeming" regulations conceptually, they are nevertheless remanded to the Sec-

retary for reconsideration in light of a series of ambiguous factors delineated in the majority's opinion. Slip Op. at 10–11. This court should resolve this case as it is presented; a remand is not necessary for the resolution of issues involved in this appeal.

The majority should recognize that the scope of our review is severely circumscribed. The Secretary's regulations should be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A), (C). *See Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). The majority opinion acknowledges that both "SSI States" and "209(b) States"[1] are governed by the same requirement, i.e., that only "available" income be considered in determining eligibility for Medicaid benefits. However, in the SSI States, income is deemed by statute to accrue to an institutionalized spouse for a period of six months. 42 U.S.C. § 1382c(b) The Secretary identifies this provision as authority for "deeming" in 209(b) States. The majority deals with this proposal by stating that

> "[i]t is enough to say that there is no required federal statutory 'deeming' in the 209(b) jurisdictions which are the subject of this case, and that there is no justification for extending the anti-fraud six-month limitation on the general policy beyond its statutory confines."

Slip Op. at 7 (footnote omitted).

One additional factor is useful in identifying the extreme nature of the Gray Panthers' attack. At oral argument the following colloquy occured:

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[1] States participating in the Medicaid program fall into two categories: those which determine eligibility under the Supplemental Security Income program ("SSI") Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.* (1976) and those states which have elected a more restrictive eligibility criteria, an option authorized by Section 209(b) of the 1972 Amendments to the Social Security Act, Pub. L. No. 92-603, 86 Stat. 1484 codified at 42 U.S.C. § 1396a(f). In shorthand fashion, the states exercising this option are referred to as "209(b) States" and others as "SSI States."

Judge MacKinnon: "They're not going back; they're staying with them [the standards in effect in 1972].

* * * * *

Mr. DeFord [counsel for the Gray Panthers]: "Well, my only point is whatever the standards in 1972, if they were impermissible at that time a state should not be allowed to go back to them."

Judge MacKinnon: "What are you talking about, go back to them?"

Mr. DeFord: "Well, a state should not be able to maintain them, then. If they were impermissible in 1972 under the statute as set out in 1965, then the states should not be able to use the 209(b) option to maintain any invalid attribution of income."

Judge MacKinnon: "Well, then your point is they're all invalid. The deeming is all invalid."

Mr. DeFord: "That's correct your Honor . . .".

Later, the court and counsel turned to the question of what effect invalidating the deeming regulations would have administratively:

Judge MacKinnon: "Go through determination, you mean go to hearing?"

Mr. DeFord: "The normal welfare procedure, your Honor, by which a state determines what the income and expenses of the individual are. It is a fairly common procedure."

Judge Wright: "You mean, there would have to be a fact hearing in every case?"

Mr. DeFord: "I'm not talking about a hearing, your Honor. I'm simply talking about the state welfare officials sitting down with the non-institutionalized spouse figuring out what the expenses and income of that individual are."

These colloquies illustrate several important points. First, Gray Panthers is attacking the *concept* of "deeming", not just its application to Medicaid programs in the 209(b) States. Second, Gray Panthers would substitute an individual hearing in every case for "deeming." The extreme nature of these arguments also provides a basis for

their rebuttal. The purpose of "deeming" is not only to mitigate fraud, a ubiquitous and monstrously costly problem in the administration of any assistance program, but also to facilitate the administration of the program itself, thereby reducing the percentage of resources devoted to the administration programs, and increasing the percentage which can be actually distributed to program beneficiaries. *See Brown v. Stanton*, ___ F.2d ___, No. 79-1459 at 18 (January 30, 1980) (Pell, J., concurring in part, and dissenting in part). While counsel for Gray Panthers did not advocate a full dress adversary hearing but an individualized, in-person determination of expenses and income for each couple affected by this program, the fact remains that such a proposal is a limited hearing, albeit termed an informal one and would involve practically all the detriments of a hearing. In administering Social Security benefits, Congress has often elected to use "simple criteria". The Supreme Court has observed that "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. *Weinberger v. Salfi*, 422 U.S. 749, 776 [1975]." *Califano v. Jobst*, 434 U.S. 47, 53 (1977). Nothing in the statute suggests that Congress intended to deny the states recourse to similar efficiencies. Nothing in the statute suggests that Congress intended to burden participating states with the layers of administrative structure.

The approach taken by the majority falls well short of that advocated by the Gray Panthers. But the soft direction provided by the court will not provide meaningful guidance for the Secretary to reevaluate her regulations. Indeed, the groundwork has already been laid for a second appeal to measure compliance by the Secretary against the somewhat indefinite benchmarks provided by the majority. We could avoid this recurring review without distorting the statutory scheme by affirming the Secretary's regulations.

II

The only villain here is the level of need which has not been adjusted to reflect skyrocketing costs of living. However well-intentioned, the court cannot through a remand to the Secretary affect the inflationary pressures which are particularly burdensome to people on fixed incomes. In a concise concurrence in *Kollett v. Harris*, ___ F.2d ___, No. 79-1453 (1st Cir. April 18, 1980), upholding "deeming" from a parent to a disabled child in determining the amount of cash assistance payments under a Supplemental Security Income program, 42 U.S.C. 1381 *et seq.*, Judge Aldrich aptly addressed the issue of "deeming":

> As one who participated in *Boucher v. Minter*, D.Mass., 1972, 349 F.Supp. 1240, from which plaintiffs would derive much support, I feel I should recite that I am entirely comfortable with its present rejection. The enormous enterprise which social insurance has become would fall of its own weight if practical, rule of thumb guidelines could not be established to avoid piece by piece scrutiny of every case. The Supreme Court having forcefully recognized that this is permissible even though occasional hardship is inevitable, *Weinberger v. Salfi*, 1975, 422 U.S. 749, the principle applies that there must be some reason in fact, or logic, before the agency's judgmental expertise is overruled. On the point here in issue the agency's experience is obviously considerable. I cannot think that it abused its discretion in choosing this rule rather than some other.

Id. at 25.

III

Because in my opinion there is nothing to suggest that the Secretary's action in promulgating the regulations allowing the use of "deeming" in SSI States states is arbitrary or capricious, the limit of our scope of review, I respectfully dissent from that part of the court's opinion which holds to the contrary.

APPENDIX B

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

No. 79-1334

GRAY PANTHERS

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

[Filed Sept. 3, 1980]

Before: WRIGHT, *Chief Judge* and BAZELON, *Senior Circuit Judge.*

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed July 29, 1980 be, and it is hereby, amended as follows:

Page 1: Change "Health, Education and Welfare" in the listing of counsel to "Health and Human Services"

Page 3: Change "acocrdance" in line 4 of the first full paragraph to "accordance"

Delete "a" in line 8 of the same paragraph

Page 4: Change "precusors to" in the third line from the bottom of text to "precursors of"

Page 8: Change "(1980)" in line 4 to "(8th Cir. 1980)"

Change "(1980)" in line 14 to "(1st Cir. 1980)"

Change "as" in the last line of text to "at"

Page 9: Change "SSS" in line 4 to "SSI"

Page 10: Change "(1980)" in the last line of text to "(5th Cir. 1980)"

Page 14: Change "(1980)" in line 2 of footnote 15 to "(1st Cir 1980)"

Per Curiam
For the Court

George A. Fischer
/s/ ROBERT A. BONNER
By: Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

No. 79-1334

GRAY PANTHERS

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Filed Aug. 12, 1980]

Before: WRIGHT and MACKINNON, *Circuit Judges*, and MARKEY, *Chief Judge*, United States Court of Customs and Patent Appeals

ORDER

It is ORDERED by the Court, *sua sponte*, that the dissenting opinion in the above captioned case, filed herein July 29, 1980, be and hereby is, amended as follows:

On page 6, line 3, strike "SSI States states" and insert "209(b) States".

Per Curiam
For the Court

/s/ George A. Fisher

GEORGE A. FISHER
Clerk

APPENDIX D

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil 78-0661

No. 79-1334

GRAY PANTHERS

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

[Filed July 29, 1980]

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, *Chief Judge*, MACKINNON, *Circuit Judge*, and MARKEY*, *Chief Judge*, United States Court of Customs and Patent Appeals

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed and the case is remanded to the District Court with directions to remand

*Sitting by designation pursuant to 28 U.S.C. § 293(a)

it to the Secretary for reconsideration, consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date July 29, 1980

Opinion for the Court filed by Chief Judge Wright.

Opinion concurring in part and dissenting in part filed by Circuit Judge MacKinnon

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

GRAY PANTHERS, PLAINTIFF,

v.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE ET AL., DEFENDANTS.

Civ. A. No. 78-0661.

Dec. 8, 1978.

MEMORANDUM OPINION

CHARLES R. RICHEY, *District Judge.*

This case is before the Court on cross motions for summary judgment.[1] The basic issue in this case is whether regulations[2] promulgated by the defendants, which allow states to "deem" income from a non-institutionalized spouse available to an institutionalized spouse, are inconsistent with the requirements of the Medicaid statute, in particular 42 U.S.C. § 1396a(a)(17). The Court finds there to be no genuine issue of material fact in dispute and, for

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[1] Plaintiff initially filed a motion for partial summary judgment which sought judgment only as to the statutory claim. However, in its reply to defendants' motion for summary judgment, the plaintiff expanded its initial motion to one for summary judgment on all claims. *See* Plaintiff's Reply Memorandum at 1 n.1) (October 13, 1978).

[2] New regulations were made final since the motions were filed. The parties, however, have stipulated that these new regulations (42 C.F.R. §§ 435.734, 436.602 and 436.711) have the same effect as the prior regulations (42 C.F.R. §§ 448.3(b)(1), (4), and 448.21(a)(2). *See* Stipulation (November 22, 1978). To be consistent with the papers in this case, the Court's Memorandum Opinion and Order will use the former regulations—but the parties should consider references to the prior regulations to be references to the appropriate present ones.

the reasons hereinafter stated, will grant summary judgment to the plaintiff on its statutory claim for relief.

I. BACKGROUND

Plaintiff, Gray Panthers seeks in this action to invalidate as inconsistent with the Medicaid statute regulations promulgated by the defendants which allow certain states to "deem" available to an institutionalized spouse income from the noninstitutionalized spouse.

Medicaid is a cooperative federal-state program established pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* In accordance with the Act, the Secretary of Health, Education and Welfare promulgates regulations, through the Administrator of the Health Care Financing Administration, which supplement the statutes in providing the framework in which participating states must develop and operate their Medicaid programs. States are not required to institute a Medicaid program, but if they choose to do so, they must submit to the Secretary of HEW a satisfactory "state plan" which fulfills all requirements of the Act. 42 U.S.C. § 1396a. The state plan describes the nature and scope of the state's Medicaid program and provides assurances that the state will administer its program in conformity with the requirements of the federal statute, regulations, and other applicable official issuances of the Department. 45 C.F.R. § 201.2. If the state submits a plan which fulfills all the requirements of the Act, the Secretary must approve it. 42 U.S.C. § 1396a(b). The state thereupon becomes entitled to grants of federal funds in reimbursement of a portion of the expenditures which it makes in providing specific types of medical assistance to eligible individuals under the plan in accordance with the federal conditions. 42 U.S.C. § 1396b; 45 C.F.R. § 201.5.

Section 1902 of the Social Security Act, 42 U.S.C. § 1396a, provides, in pertinent part:

(a) A state plan for medical assistance must—

* * * * *

> (17) include reasonable standards. . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . ., (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child.

Prior to April 13, 1977, all participating states were subject to the same controlling federal regulations. Section 248.3 of Title 45 of the Code of Federal Regulations stated that, with respect to the categorically needy and the medically needy (if included in the state plan), a state plan must "provide that only such income and resources as are *actually available* will be considered and the income and resources will be reasonably evaluated." (emphasis added). On the basis of section 1902(a) of the Act and these regulations states were expected to evaluate the eligibility of individuals applying for Medicaid who required institutionalization and whose spouses continued to live in the couple's home. Despite the requirement that only "available income" should be considered, states considered an arbitrary portion of the income of non-institutionalized spouses available for the care of institutionalized spouses whether in fact that income was available and whether the noninstitutionalized spouse was actually able to make such an amount available. This inputing of income on the basis of an arbitrary formula, without regard to the amount actually available to the institutionalized spouse, is commonly referred to as "deeming."

New regulations were promulgated and finalized, effective April 13, 1977. The introductory language of the regulations read, in part:

> (b) With respect to both the categorically needy and, if they are included in the plan, the medically needy, a State plan must:

> (1) *General.* Provide that only such income and resources as are considered available under the provisions of this section may be considered as an applicant's or recipient's income in determining eligibility or the amount of assistance and that income and resources will be reasonably evaluated.

42 C.F.R. § 448.3. The effect of this new introductory language is the imposition of different requirements amongst the various jurisdictions. The thirty-four states and the District of Columbia which automatically provide Medicaid assistance to recipients of Supplementary Security Income ["SSI"] are now specifically required to use the SSI rules on availability of income. 42 Fed.Reg. 2685. When Congress initially created SSI, it intended to require that all states provide Medicaid assistance automatically to all SSI recipients. Because this would have resulted in a huge increase in the Medicaid rolls in the various states, and Congress feared that some states might opt out of the Medicaid program altogether, Congress added a provision which gave states the option of utilizing more restrictive eligibility conditions. Under this provision, section 1902(f) of the Act, 42 U.S.C. § 1396a(f), a state was permitted to use any financial eligibility condition which was no more restrictive than that in use under the state's January 1972 eligibility conditions for its categorical programs. Therefore, those states which elect this option may deem income available from noninstitutionalized spouses which may not in fact be available. At present, fifteen states have chosen the optional basis for determining Medicaid eligibility provided by 42 U.S.C. § 1396a(f).

In its complaint, plaintiff raises three claims for relief. First, plaintiff claims that the "deeming" of income from a noninstitutionalized spouse to an institutionalized Medicaid recipient is in violation of 42 U.S.C. § 1396a (a)(17), and is, therefore, void. Second, plaintiff contends that the "deeming" of income creates an irrebuttable presumption which violates the due process clause of the fifth amendment. Third, plaintiff contends that the deeming of

income violates the equal protection component of the due process clause of the fifth amendment.[3]

II. DISCUSSION

The issue presented for resolution is whether the deeming of income between spouses separated by institutionalization, permitted by 42 C.F.R. §§ 448.3(b), 448.21(a)(2) violates the requirements of 42 U.S.C. § 1396a(a)(17) of the Medicaid statute. The Court, after careful consideration of the extensive memoranda filed and the relevant authorities, finds that deeming is inconsistent with the statute.[4] This conclusion is based on the language of the statute, its legislative history and case law interpreting it.

As noted above, 42 U.S.C. § 1396a(a)(17) provides, in pertinent part, that a state plan for medical assistance must include reasonable standards for determining eligibility which

> (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or

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[3] Because of the Court's resolution of the statutory issue, the Court need not and should not reach the constitutional issues raised by the plaintiff. *See Rosado* v. *Wyman*, 397 U.S. 397, 402, 90 S. Ct. 1207, 25 L. Ed.2d 442 (1970); *King* v. *Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L.Ed.2d 1118 (1968).

[4] Although defendants have raised an objection to plaintiff's standing to bring this action, the Court finds, upon review of the affidavits and complaint, that plaintiff has standing because its members would have standing to sue in their own right. *See Hunt* v. *Washington Apple Advertising Co.*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977); Affidavits of Smith (September 5, 1978), Sandifer (September 5, 1978), Goldfarb (November 7, 1978), and Pittman (November 12, 1978).

> recipient is such individual's spouse or such individual's child. . . .

The statute clearly states that only such income and resources as are "available to the applicant" may be taken into account. The phrase "as determined in accordance with standards prescribed by the Secretary" allows the Secretary to prescribe broad standards for determining what is "available;" however, this phrase does not allow the Secretary to determine in a wholesale fashion what *should* be available to the applicant.[5] This interpretation is clear from the legislative history of the statute.

The Senate Finance Committee, which prepared the report on the Medicaid statute, states:

> Another provision is included that requires States to take into account only such income and resources as (*determined in accordance with standards prescribed by the Secretary*), are *actually available* to the applicant or recipient. . . .

S.Rep. No. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] U.S. Code Cong. & Admin. News, pp. 1943, 2018 (emphasis added). Thus, it is clear that the phrase "determined in accordance with standards prescribed by the Secretary" in subpart (B) was not intended to remove the requirement that only "actually available" income and resources would be considered.

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[5] Subpart (D) of the statute is not to the contrary. That subpart merely prohibits a state from taking into account the "financial responsibility" of anyone except spouses and parents. While it may allow a state to enforce its financial responsibility laws against a spouse or parent, this subpart does *not* suggest that the amount of contribution from that person should be a deemed amount. In fact, this is exactly what Congress had intended subpart (D) to mean.

> The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children even though 21 years of age or older. Such requirements for support may reasonably include the payment *by such relative, if able,* for medical care.

S. Rep. No. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] U.S. Code Cong. & Admin. News, pp. 1943, 2018 (emphasis added).

If there were any doubt as to whether deeming violates the Medicaid statute, such doubt evaporates when the purpose of 42 U.S.C. § 1396a(a)(17) is considered. According to the Finance Committee,

> [t]hese provisions are designed so that the States will not assume the availability of income *which may not, in fact, be available. . .*

S.Rep. No. 404, *supra* (emphasis added). By applying an arbitrary formula, unrelated to the expenses of a particular couple's needs, deeming may well result in states "assum[ing] the availability of income which may not, in fact, be available." This would, therefore, be directly contrary to the purpose of the statute.

Thus far, every court that has been confronted with the validity of the deeming procedure has found it to be in violation of the Medicaid statute. In *Herweg* v. *Ray*, 443 F. Supp. 1315, 1319 (S.D. Iowa 1978), the court noted:

> This Court joins other courts in holding that state procedures which "deem" a computed portion of a spouse's income to be available for an institutionalized spouse's expenses by the application of an arbitrary formula are contrary to 42 U.S.C. § 1396a(a)(17) as shown by its language and the expressed Congressional intent.
>
> * * * * *
>
> In the Court's opinion, the state procedure must provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse. Otherwise the procedures will be in conflict with 42 U.S.C. § 1396a(a)(17). Such determination must give due consideration to the individual obligations and the particular needs of each spouse and family.

See Norman v. *St. Clair*, No. 77-1722 (5th Cir. April 11, 1977) (Order of Judge Ainsworth granting injunction pending appeal to a couple challenging the deeming procedure); *Manfredi* v. *Maher*, 435 F. Supp. 1106, 1114 (D. Conn. 1977) ("It was Congress' intent, as reflected in the legislative history . . . , that spouses be obliged to support

each other only 'if able.' U.S. Code Cong. & Admin. News 1943, 2018 (1965)."[6]) Moreover, in *Burns* v. *Vowell*, 424 F. Supp. 1135 (S.D. Texas 1976), the court scrutinized the legislative history of 42 U.S.C. § 1396a(a)(17) and concluded that

> deeming is never a proper procedure within the requirements for the establishment of means for reasonably evaluating financial responsibility of non-institutionalized spouses . . . [T]he income of a non-institutionalized spouse can [only] be considered . . . through the application of reasonable standards and not on the basis of an irrebuttable presumption that the money is available for the care and support of the institutionalized spouse. Deeming . . . is not consistent with the federal statutes and regulations, and cannot be employed to impute income.

424 F. Supp. at 1140–41. Accordingly, this Court is convinced that the deeming procedure violates the Medicaid statute, and, therefore, is invalid.

III. CONCLUSION

The Court has carefully analyzed the language of the statute, its legislative history, and the pertinent case law. All unequivocally indicate that the deeming procedure—42 C.F.R. §§ 448.3(b)(1), (4); 448.21(a)(2)—is inconsistent with the requirements of the Medicaid statute, 42 U.S.C. § 1396a(a)(17).

An Order in accordance with the foregoing will be issued of even date herewith.

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[6] The court in *Franssen* v. *Juras*, 406 F. Supp. 1375 (D. Or. 1975) appears to also have found deeming invalid. While there is some language in the opinion which may suggest that the presence of a relative responsibility law is determinative, the court expressly noted that the state must "reasonably evaluat[e] the income and resources actually available . . . [and] impose responsibility conform[ing] to federal law." 406 F. Supp. 1379. *See Burns* v. *Vowell*, 424 F. Supp. 1135, 1140–41 (S.D. Texas 1976).

APPENDIX F

United States District Court

FOR THE DISTRICT OF COLUMBIA

C.A. No. 78-0661

GRAY PANTHERS, PLAINTIFF

v.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., DEFENDANTS.

[Filed Dec. 8, 1978]

ORDER

Upon consideration of the cross motions for summary judgment, the memoranda filed in support thereof and in opposition thereto, the entire record herein, and in accordance with the Memorandum Opinion issued of even date herewith, and it appearing to the Court that there exist no genuine issues of material fact in this case, it is, by the Court, this 8th day of December, 1978,

ORDERED, that plaintiff's motion for summary judgment be, and the same hereby is, granted, as to Count 1 of the complaint; and it is

FURTHER ORDERED, that defendants' motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, that defendants' regulations, codified at 42 C.F.R. §§ 448.3(b)(1), (4), 448.21(a)(2), are in violation of the Social Security Act; and it is

FURTHER ORDERED, that defendants, their successors in office, agents, employees, and all persons acting in concert with them, are enjoined to rescind the offending regulations, 42 C.F.R. §§ 448.3(b)(1), (4), 448.21(a)(2), to

require all relevant jurisdictions to cease the deeming of income for any length of time between institutionalized Medicaid recipients or applicants and their noninstitutionalized spouses, and to promptly propose and publish new regulations which will conform with the statute; and it is

FURTHER ORDERED, that, with respect to Counts II and III, dealing with the claims of constitutional infirmities raised by the plaintiff, the Court will dismiss these claims, without prejudice, in accordance with the Memorandum Opinion of even date herewith, because, in light of the nature of the Court's ruling, it is unnecessary to reach such constitutional issues; and it is

FURTHER ORDERED, that judgment shall be entered in favor of the plaintiff with costs to be assessed against defendants.

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

APPENDIX G

United States District Court

FOR THE DISTRICT OF COLUMBIA

C.A. No. 78-0661

GRAY PANTHERS, PLAINTIFF,

v.

ADMINISTRATOR, HEALTH CARE FINANCING AND ADMINISTRATION, ETC., AND SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ETC., DEFENDANTS

[Filed Jan. 3, 1979]

ORDER

Upon consideration of defendants' motion to amend order and judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and the memoranda of the parties in support thereof and in partial opposition thereto, together with all pleadings and memoranda filed in this action, it is, by the Court, this 3rd day of January, 1979,

ORDERED, that the third and fourth paragraphs of the Court's order in this action issued on December 8, 1978, are amended to read as follows:

> "FURTHER ORDERED, that defendants' regulations, formerly codified at 42 C.F.R. §§ 448.3(b)(1)(4), 448.21(a)(2), and now codified at 42 C.F.R. §§ 435.734, 436.602, 436.711 and 436.821, are in violation of the Social Security Act; and it is
>
> "FURTHER ORDERED, that defendants, their successors in office, agents, employees, and all persons acting in concert with them are enjoined to rescind the offending regulations, 42 C.F.R. §§ 435.734, 436.602, 436.711, 436.821, to require all relevant

jurisdictions to cease deeming of income for any length of time between institutionalized Medicaid recipients or applicants and their noninstitutionalized spouses, and to promptly propose and publish new regulations which will conform to the statute; and it is";

and it is

FURTHER ORDERED, that an additional paragraph be added which states:

"The effect of this Order is restricted to states which exercise their option under § 1902(f) of the Social Security Act, 42 U.S.C. § 1396a(f) and the jurisdictions of Guam, Puerto Rico and the Virgin Islands."

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

APPENDIX H

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. 42 U.S.C. 1396a(a) provides in pertinent part:

A state plan for medical assistance must—

* * * * *

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient * * * in determining his eligibility for such aid, assistance or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the

Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

* * * * *

2. 42 U.S.C. 1396a(f) provides in pertinent part:

Notwithstanding any other provision of this subchapter, * * * no State not eligible to participate in the State plan program established under subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of subchapter XVI of this chapter) for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1396b(f) of this title (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual, and incurred expenses for medical care as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972. * * *

3. 42 C.F.R. 435.734 provides in pertinent part:

In determining medicaid eligibility of an aged, blind, or disabled individual under requirements more restrictive than those used under SSI, the agency must consider the income and resources of spouses * * * as available to the individual in the manner specified in § 435.723 * * * or in a more extensive manner, but not more extensive than the requirements in effect under the medicaid plan on January 1, 1972.

4. 42 C.F.R. 435.723 provides:

(a) If the agency provides medicaid to SSI recipients, it must meet the requirements of this section in

determining eligibility of aged, blind, and disabled individuals under the optional coverage provisions of §§ 435.210, 435.211, and 435.231.

(b) The agency must consider income and resources of spouses living in the same household as available to each other, whether or not they are actually contributed.

(c) If both spouses apply or are eligible as aged, blind, or disabled and cease to live together, the agency must consider their income and resources as available to each other for the first 6 months after the month they cease to live together. After this 6-month period, the agency must consider only the income and resources that are actually contributed by one spouse to the other.

(d) If only one spouse in a couple applies or is eligible and they cease to live together, the agency must consider only the income and resources of the eligible [*sic*] spouse that are actually contributed to the eligible spouse after the month in which they cease to live together.

5. 42 C.F.R. 436.602 provides:

Except for a spouse of an individual or a parent for a child who is under 21 or blind or disabled, the agency must not—

(a) Consider income and resources of any relative available to an individual; nor

(b) Collect reimbursement from any relative for amounts paid by the agency for services provided to an individual.

6. 42 C.F.R. 436.711 provides:

In determining eligibility of individuals specified in subparts B and C of this part who are not recipients of cash assistance, the agency must apply the financial eligibility requirements of the State plan for OAA, AFDC, AB, APTD, or AABD that would be used if the individual were applying for cash assistance. This includes requirements on financial responsibility of spouses and parents, except that, in determining eligibility of families and children, the agency must consider parental income and resources as avail-

able to a child who is living with the parents until he becomes 21, even if State law confers adult status below age 21.

7. 42 C.F.R. 436.821 provides:

In determining eligibility of medically needy individuals, the agency must use the rules for determining whether the income of a spouse or parent is available to the individual that would be used if he were applying for OAA, AFDC, AB, APTD, or AABD. However, for families and children, the agency must consider parental income and resources available to a child who is living with the parent until he becomes 21, even if State law confers adult status below age 21.

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